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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 280

UNITED STATES OF AMERICA, PETITIONER

v.

PAUL TANNER

UNITED STATES OF AMERICA, PETITIONER

v.

ELIZABETH RUTH PAUL, EXECUTRIX OF THE ESTATE OF EARLE EVARTS PAUL, DECEASED

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO BRIEF IN OPPOSITION

In its petition for certiorari in this case, the Government seeks review of a Court of Claims decision which, by an interpretation of the Act of July 1, 1947, 10 U. S. C. (1946 ed.) 371, 371b (Pet. 3–4), grants a wholly unwarranted exception to Army reserve officers from the traditional statutory restrictions on the simultaneous receipt

of retired pay and government salary.[1] Those charged with the administration and application of the controlling statutes have never so read them. And, as shown in the petition for certiorari, the plain language of the statutes, their history and purpose support the conclusion that uniform application was intended. In other words, Army reserve officers are in the same position, insofar as the receipt of dual compensation from the Government is concerned, as other service officer groups.

Recognizing the force of this position, the brief in opposition endeavors to create a belief that Congress must be deemed to share the view of the court below and to have intended the irrational inequality of treatment which flows from that decision. This attempt proceeds in two ways. On the one hand, respondents refer to statements, said to compel this conclusion, by members of Congress in connection with current pieces of legislative business, unrelated to the present problem. In addition, respondents appear to assert that inequity of treatment is inherent in the pattern which Congress has established for various service classes and that, accordingly, the judgment of

[1] As set forth in the petition (pp. 7–14), the statute relied on by the Court of Claims for the creation of this broad privilege was intended by Congress to protect government-employed reservists for the 15-day active training period, a much narrower and entirely different purpose than that for which the court below utilized it.

the court below can be taken as fitting into such pattern. We shall show below that there is little substance to either of these two arguments. First, however, we shall comment on respondents' argument that this Court lacks jurisdiction to entertain the government's petition.

1. Respondents contend that the petition for certiorari in this case "* * * was not filed within the time allowed by law * * *" (Br. in Opp., 1–2). Respondents' essential position is that the question whether the November 2 opinion constituted a final reviewable judgment, for the purpose of starting the running of the ninety-day period provided by 28 U. S. C. 2101 (c),[2] turns on the intention of the court below. Starting with this premise, respondents contend that, since the court below, in its opinion on November 2, 1954, decided that respondents could receive retired pay, the opinion constituted a final judgment. Referring to the docket entries of November 2, 1954, and to certain rules of the Court of Claims (Br. in Opp., Apps. A and B, 24–27), respondents conclude that the court below "* * * regarded its opinion of November 2, 1954, as the real judgment. * * *" (Br. in Opp., 5).

[2] 28 U. S. C. 2101 (c) provides:

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. * * *

The ascertainment of finality of action for the purpose of determining appealability, frequently a technical and troublesome question, has arisen on frequent occasions in connection with Court of Claims judgments. Initially, of course, the finality problem with regard to Court of Claims action arose in connection with a fundamental constitutional problem. See, *e. g.*, *Gordon* v. *United States*, 2 Wall. 561, and opinion of Mr. Chief Justice Taney set forth at 117 U. S. 697. In the light of the *Gordon* case, Congress specifically inserted the word "final" in describing those Court of Claims judgments reviewable in this Court by the Act of March 3, 1863, 12 Stat. 765, 766. The word "final" was omitted in the comparable section contained in the Judiciary Act of March 3, 1911, 36 Stat. 1157. However, the omission of the word as unnecessary worked no change as to the sort of Court of Claims judgment which could be presented for review. See *United States* v. *Ellicott*, 223 U. S. 524, 539; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 535; *Morse* v. *United States*, 270 U. S. 151, 154; *Southern Pacific Co.* v. *United States*, 270 U. S. 103, 105; *Standard Steel Car Co.* v. *United States*, 61 Ct. Cls. 391. The pertinent provisions of the 1911 Act were superseded by the Judiciary Act of February 13, 1925, 43 Stat. 936, 939. Here again, Chief Justice Taft, in presenting this Court's legislative proposals, made it plain that

only *final* judgments of the Court of Claims would be reviewed. *Hearings before the Subcommittee of the Senate Committee on the Judiciary,* 68th Cong., 1st Sess., February 2, 1924, on S. 2060 and S. 2061, p. 22; see also H. Rep. 1075, 68th Cong., 2d Sess., p. 4.[3]

This traditional restriction on the nature of Court of Claims judgments reviewable in this Court has, over the years, been taken as meaning, in the ordinary type of case, that judgments were not ripe for review until finalized in every respect. However, it was early recognized that, in certain types of cases, it was clearly to the advantage of all litigants, and to the courts in the administration of their business, to defer troublesome and expensive hearings on the question of monetary recovery until fundamental issues on the merits were completely put at rest.[4] Thus, severances and the entry of separate orders on the merits

[3] The 1948 Revision of the Judicial Code seems to us to have worked no substantial change. 28 U. S. C. 1255. See, however, the Reviser's Note which states that the section, as codified, permits unrestricted review of Court of Claims judgments. Cf. Stern and Gressman, *Supreme Court Practice*, (2d ed. 1954) 44–45.

[4] Contrary to respondents' suggestion (Br. in Opp., 3), the ascertainment of the exact amount of recovery is rarely a simple act of computation. Even in a pay case such as this, innumerable and time-consuming variations arise. See, *e. g.*, Br. in Opp., 7–8. And in many other types of cases issues of great complexity, requiring hearings and trials over long periods of time, may be necessary before final ascertainment of damages.

were utilized in patent cases, Indian claims cases, and cases arising under special jurisdictional acts. See, *e. g., Marconi Wireless Co.* v. *United States,* 320 U. S. 1, 47; *United States* v. *Alcea Band of Tillamooks,* 329 U. S. 40 and 341 U. S. 48; *United States* v. *Esnault-Pelterie,* 299 U. S. 201. In such cases, both the orders on the merits and the "final" judgments were held to be reviewable. *Marconi Wireless Co., supra.* As other types of cases in the Court of Claims began to present, in increasing numbers, the same sort of problems which had justified the severance practice in the patent and Indian cases, the same method of handling was utilized. See *United States* v. *Caltex,* 344 U. S. 149.

As we see it, then, a flexible and efficient procedure, developed in areas where it has constituted traditional practice, has been extended to any case in which it is appropriate and in the interest of litigants to present Court of Claims action to this Court for review at either of two points, the entry of a first order on the underlying issues or the entry of a "final" order terminating the entire proceedings. Thus, even if the November 2 opinion in this case constituted a reviewable interlocutory order, we do not believe that the whole case could not be brought up by a petition addressed to the order entered on May 3, 1955 (Pet. 27).

However, it is not necessary to reach that question in the instant case since it is clear that the Court of Claims had no intention on November 2, 1954, of issuing an *order* on the merits in this case. We think it clear, as respondents suggest, that what constitutes a final and reviewable judgment or order is within the control of the court whose action is in question. As noted by both majority and dissenting opinions of this Court in *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206, 212, 216, it has been held that it is the "* * * obvious intent of the [court below], apparent on the face of the proceedings. * * *" which is crucial. *Rubber Co.* v. *Goodyear*, 6 Wall. 153, 155–156. In this case, the "obvious intent" is crystal clear. As revised in 1953, Rule 38 (c) of the Court of Claims Rules provides:

> (c) *Separate Determination of Liability:* Upon stipulation of the parties, subject to approval by the Commissioner, or upon order of the Court or the Commissioner, trials may be limited to the issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery and the amount of offsets, if any, for further proceedings.
>
> In any case, whether or not such an order has been entered, where the Court determines that a party is entitled to recover and the amount of the recovery is reserved

> for further proceedings, the judgment on the question of the right to recover shall be final, subject to proceedings had under Rules 53 and 54.[5]

In other words, in 1953 the Court of Claims specifically recognized the need for a clear procedure with regard to reviewable interlocutory orders when such were intended. We are advised that the action was taken with this Court's decision in the *Minneapolis-Honeywell* case in mind. In any event, the court adopted a procedure whereby finality could easily be recognized where intended.[6]

The language of the opinion of November 2, and the docket entries made on the same date,

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[5] Prior to the 1953 revision, Rule 38 (c) contained no provision with regard to the entry of a final judgment and an interlocutory phase of severed proceedings. Rule 38 (c), as it read prior to 1953 provided:

> (c) *Preliminary Determination of Liability:* Upon stipulation of the parties, subject to approval by the Commissioner, or upon order of the Court, trials in the first instance shall be limited (1) in patent cases to the issues of validity and infringement and (2) in other cases to the issues of law and fact relating to the right of plaintiff to recover. If, upon determination of such issues, the Court holds in favor of plaintiff, it shall enter its judgment in the form of an interlocutory order, reserving the determination of the amount of recovery and the amount of off-sets, if any, for further proceedings.

[6] Cf. *Sears, Roebuck and Co.* v. *Mackey*, No. 34, this Term, in which this Court will have before it the interrelation of court rules and statutes controlling the right to appeal from district courts to courts of appeals.

must be considered in the light of this rule. The opinion of November 2, 1954, specifically states "* * * entry of judgment will be suspended * * *" (Pet. 25). Similarly, the docket entry of November 2, 1954 recites specifically that the entry of judgment is suspended (Br. in Opp., App. A, 24). Finally, the judgment of May 3, 1955, again recites that an opinion was handed down on November 2, 1954, but that the entry of judgment was suspended (Pet. 27). We submit that, in revising Rule 38 (c), the Court of Claims sought to avoid unintended and automatic consequences at interlocutory phases of cases, that it reserved the right to enter or not to enter a reviewable judgment on issues on the way to a final judgment, and that, here, the precise wording of the opinion, the docket entry and the judgment demonstrate that the Court of Claims did not intend to issue a reviewable judgment on November 2, 1954.[7] We further submit that this intention is controlling. See *Rubber Co.* v. *Goodyear,* supra; *Healy* v. *Pennsylvania R. Co.,* 181 F. 2d

[7] To support its position, respondents argue that the Government's motion to *reconsider* the result reached in the opinion of November 2, 1954, was in effect a recognition that a final order had been entered. However, it seems clear that a litigant is entitled to ask for the reconsideration of any ruling during the progress of a litigation without running the risk of losing the right of review by doing so. Moreover, the Government was careful to frame its motion to the court below in terms other than those prescribed by that Court's rules for motions addressed to final judgments.

934, 937 (C. A. 3); *In re Forstner Chain Corp.*, 177 F. 2d 572, 575 (C. A. 1); *Crutcher* v. *Joyce*, 134 F. 2d 809 (C. A. 10). Accordingly, the time within which to petition for certiorari did not begin to run in this case until May 3, 1955.

2. As indicated above, the brief in opposition argues that Congress must be deemed to share the view of the court below on the merits of this case, namely, that the 1947 statute was designed to create a preference, with regard to the unrestricted right to receive retired pay and governmental salary, for Army reserve officers alone. This argument is based in part on excerpts from two areas of current legislative activities (Br. in Opp., 20–22). Read in context, neither of these excerpts lead to the conclusion for which respondents advance them.

a. Respondents attempt to derive from the legislative history of P. L. 239, 84th Cong., 1st Sess., the inference that Congress specifically approved the privilege created for Army reserve officers by the opinion below. No such inference can be drawn from a fair consideration of this legislation, the Government's position on it, or its legislative history. P. L. 239, reaffirming the policy of a restriction on dual compensation, raised the statutory ceiling from $3,000 to $10,000, an action taken in the light of modern considerations with regard to appropriate income. H. Rep. No. 888, 84th Cong., 1st Sess.; S. Rep. No. 1023, 84th

Cong., 1st Sess. The legislation also extended statutory disability benefits to veterans of military action in Korea. Interested government agencies, commenting on either or both of these purposes, gave their support to the statute. See Committee Reports, *supra*. With respect to the legislative history of the Act the brief in opposition relies on a question and answer which do not sustain the weight put on them. Properly construed, the quoted remark of Congressman Aspinall (Br. in Opp., 21) says no more than that the proposed legislation makes no change in existing law with respect to the right of Army reserve officers to dual compensation. The Congressman does not state approval of the Court of Claims decision herein or disapproval of the Government's past or present position on the issue.

b. The other alleged bit of "legislative history" on which respondents rely relates not to P. L. 239, but to an entirely different bill, H. R. 7049. H. R. 7049, 84th Cong., 1st Sess., is the culmination of an enormous effort, so far not successful, to codify Titles 10 and 32 of the Code, covering all laws relating to the Armed Forces and the National Guard. After eight years of effort, including extended hearings and vast amounts of drafting and conference work, the bill reached the floor of the House and an effort was being made to pass it on the consent calendar in late July, 1955. On July 30, 1955, Congressman

Willis, in charge of the bill, was confronted by a possible objection, based on a question by Mr. Haley as to the effect of the codification on the "* * * present law * * *" with regard to reserve officers' rights to draw retired pay without regard to the Economy Act of 1932.[8] The answer to this question, as with other questions which threatened a parliamentary situation sufficient to block consent action on the bill,[9] was an assurance that the proposed codification worked no change in substantive law. Such assurances were repeatedly and clearly given. For example, Congressman Willis stated (101 Cong. Rec. 11022–11023):

* * * * *

> It is purely and simply a codification of existing law and has been reported favor-

---

[8] This, of course, was not a question that could be anticipated and was remote from the purpose of the codification.

[9] See, *e. g.*, the answer of Congressman Celler in connection with an objection based on an inquiry whether the proposed codification changed the law with regard to the sale of alcoholic beverages on military posts. Congressman Celler stated (101 Cong. Rec. 10581):

> Mr. CELLER. Mr. Speaker, will the gentleman withhold his objection for a moment? If we do not pass this today and it goes over until the next session, there will have to be another complete recodification. It would cost probably another $25,000 to do it. This is a very difficult task. We have been working on this codification, I am informed, for 8 years. I do hope the gentleman will not object. *There are no substantive changes in the law.* [Emphasis added.]

> ably by unanimous vote of the Committee on the Judiciary after consultation with the Committee on Armed Services and has been sponsored by the Department of Defense with the approval of the Bureau of the Budget.
>
> Please let me state as emphatically as I am able that this bill is not designed to make a single substantive change in existing law.
>
> As a matter of fact we have gone to the extreme of inserting in the bill a provision—section 50—that it is the legislative purpose to restate the existing law without substantive change. * * *

The committee report in connection with the legislation makes it plain that no intention can be attributed to the House, in connection with its consideration of the proposed codification, to approve or disapprove existing substantive law, let alone comment on and intervene in matters in the course of unfinished litigation. H. Rep. No. 970, 84th Cong., 1st Sess., pp. 8–10. Further, Section 50 (a) of the proposed codification specifically states: "In sections 1–49 of this Act, it is the legislative purpose to restate, without substantive change, the law replaced by those sections on the effective date of this Act."

Even if H. R. 7049 had become law, we submit that no weight could be given to the excerpt quoted in the brief in opposition (p. 21) in con-

nection with the problem presented in this case, in view of the above expressed firm purpose of Congress to avoid changes in existing substantive law. Mr. Willis appears not to have been concerned with Mr. Haley's interpretation of the law; he merely was reassuring him that whatever the law provided, it would not be changed. In fact, H. R. 7049 failed of enactment, never reaching the Senate. The emergence of the subject matter of this case as a possible objection to the consent calendar treatment was completely unexpected, as stated above. And the opportunity remains in the Senate or in either House at the next session, to put the matter straight if anyone has been misled as to the scope of the bill.

3. The other line of argument in the brief in opposition is a suggestion that inequality of treatment between regulars and reservists is intended (Br. in Opp., pp. 11–16). In support of this argument, respondents assert that, under P. L. 239, retired reservists can now receive up to $10,000 a year in combined civilian salary and retired pay whereas "* * * retired regulars in the same status can still receive nothing but retired pay because the Act of July 31, 1894, remains unchanged * * *" (Br. in Opp., 15–16). This is true only in the sense that regular Army officers retired for longevity and in receipt of retired pay in the amount of $2,500 or more per annum cannot, generally speaking, hold a civilian

position with the Government at all. Strictly, therefore, this prohibition, whether or not it be viewed as outmoded (see Br. in Opp., App. E, 29–31), is not part of the dual compensation problem with which this case is concerned. On the other hand, the limitation of the 1894 statute does not apply to a second and much larger group which is involved in this case, namely, regular Army officers retired not for longevity but for disability. Such regular Army officers are eligible for and do hold government positions in large numbers. It is this second and larger class as to which the decision below created an inequity. It should be noted that the increase in the statutory ceiling, from $3,000 to $10,000, applies to this group of regular Army officers as well as to reservists. And it is the principle of equality of treatment between the latter two groups with which the Government's petition was concerned.

Nor is the issue eliminated by the amendment raising the limitation from $3,000 to $10,000. The changed ceiling of P. L. 239 has no effect on the large number of cases already accrued. As to them, it is essential that this Court grant review if the error below is to be corrected. And apart from past cases, the same issue of inequality of treatment will arise in a very considerable number of future cases in view of increases both in retirement benefits and civilian compensation.

CONCLUSION

For the reasons set forth in the petition for certiorari and for the reasons set forth in this memorandum, it is respectfully urged that writs of certiorari should issue herein.

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SEPTEMBER 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955